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Supreme Court of the United States

OCTOBER TERM, 1956

No. 445

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The majority and dissenting opinions in the Court of Appeals have not yet been officially reported but are appended to the petition for certiorari (Pt. pp. 23 to 51).

The opinion of the United States District Court, District of New Jersey, reversed by the Court of Appeals, is reported in *United States, ex rel. DeVita* v. *McCorkle*, 133 F. Supp. 169.

The opinion of the Supreme Court of New Jersey is reported in *State* v. *Grillo*, 16 N. J. 103, 106 A. 2d 294 (1954).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the fraudulent concealment by a juror on the *voir dire* of material facts pointing to bias and prejudice vitiates a conviction as a denial to the respondent of due process of law?

Constitutional Provision Involved

The Petition sets forth under this caption the pertinent provisions of the Fourteenth Amendment to the Constitution of the United States involved in this case.

Statement

Respondent Silvio DeVita, Joseph Grillo and Ralph Rosania were convicted in the Essex County Court of New Jersey of first degree murder arising out of an armed robbery. Since there had been no recommendation for mercy by the jury as to the defendants DeVita and Grillo, under the New Jersey State Law the conviction carried mandatory death sentences. N.J.S. 2A:113-4. As to defendant Rosania the jury recommended life imprisonment. Thereafter, some time in March, 1954, evidence came to light for the first time which indicated that one of the jurors in the trial in which the present respondent was convicted and sentenced to death, had fraudulently concealed from the Court and counsel atrociously disqualifying facts pointing to bias and prejudice against the respondent in order to impose himself upon the jury.

The facts indicating the foregoing are as follows: The trial was moved on February 25, 1952, and the respective jurors were examined on their "voir dire" beginning on that date. Among the jurors who were examined and fi-

nally accepted to serve on the jury, was one Arthur Kuhnle, who was employed as a night manager for the Western Union Telegram Company on February 25, 1952, and had been so employed for a long time previous to that date. During the night of March 30, 1951, Arthur Kuhnle, while taking a deposit from the Western Union Office to be deposited in the National State Bank on Broad Street, Newark, New Jersey, was "stuck up" at the point of a gun and robbed of the money which he was carrying. This information was not known to the respondent or his counsel at the time the jury was being selected, nor at any time during the trial of the case. When questioned on his *voir dire*, Arthur Kuhnle did not disclose but concealed the fact that he had been the victim of a "stick up" only about eleven months before. The record of the *voir dire* examination discloses the following: The same juror not only failed to disclose that he had been the victim of a holdup but he failed to truthfully answer the question as to whether he knew any of the State's officers or personnel (108a).* Promptly upon the discovery of the above facts concerning the holdup and the robbery of juror Kuhnle, which discovery did not occur until March 1954, the respondent by his attorney moved for a new trial in the State Court. The motion for a new trial was denied by the County Court. The New Jersey Supreme Court affirmed, two Justices dissenting. *State* v. *Grillo*, 16 N. J. 103.

On August 16, 1954, respondent filed in the United States District Court a petition for a writ of Habeas Corpus (2a to 18a). On the same day the District Judge dismissed the application but he issued a certificate of probable cause and a stay of execution until August 19, 1954. On August 18, 1954, the Court of Appeals granted a stay of execution pending the disposition of the appeal.

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* Numeral references, unless otherwise indicated, are to the pages of the typewritten Appendix submitted to the Court of Appeals.

U. S. v. *McCorkle,* 214 F. 2nd 823 (1954). On November 19, 1954, the Court of Appeals reversed the order of the District Court of August 16, 1954, and remanded the cause for further proceeding not inconsistent with its opinion. *U. S.* v. *McCorkle,* 216 F. 2nd 743 (1954).

Thereafter the District Court granted leave to the respondent to amend the application for habeas corpus by inserting at the end of paragraph 10 thereof the following (19a):

> "10a. The aforesaid actions of concealment and deception on the part of juror Kuhnle were a fraudulent perpetration and imposture whereby the trial tribunal, its powers and responsibilities fell pro tanto into the hands of a juror who had no lawful right to be a member of the tribunal and who was able to insinuate himself there only by deception and fraud. Thereby any proceedings or judgment affecting this applicant were rendered null and void and were taken without jurisdiction."

No denial by affidavit or otherwise was ever filed by the State to respondent's charges.

Thereafter, on July 14, 1955, the District Judge filed an opinion denying the application. *U. S.* v. *McCorkle,* 133 F. Sup. 169 (1955). On appeal to the Court of Appeals oral argument was had before a three judge court and thereafter, pursuant to the order of the court reargument was had before the court *en banc.* On August 6, 1957, by a vote of 4 to 3, the Court of Appeals reversed the judgment of the District Court and directed the issuance of a writ of Habeas Corpus to the end that a new trial be allowed (Pt. p. 38).

ARGUMENT

1. Petitioner contends (Pt. pp. 10-12) that because juror Kuhnle was not asked the specific question as to whether he or any member of his family had ever been the victim of a robbery, he was not under any duty to disclose his recent robbery experience and his failure to disclose could not be said to have been intentional or wilful. However, the record of the *voir dire* discloses the following: The sixth talesman to be examined on the *voir dire* was expressly asked whether he had been the victim of an armed robbery (100a). After recess the tenth talesman to be examined was Arthur Kuhnle. He was asked the following question (101a):

> "Q. You heard the interrogations this morning, did you not? A. Yes, sir.
>
> Q. And I assume you followed them? A. Yes.
>
> Q. Let me repeat to you my position with reference to the client I represent, Mr. DeVita. I am interested in only one thing in this inquiry into the competency of the jurors and that is that the jury who finally occupy the box to try this case is open minded, free of any prejudice of any kind, nature or description whether it be because the man who was killed was a policeman or an officer of the law, whether the nationality of the defendants—anything at all that you might think of that would prejudice you? A. I would have no prejudice at all."

Despite these questions Kuhnle failed to disclose the fact that less than eleven months previously he had himself actually been the victim of an armed robbery which moreover was strikingly similar to the robbery involved in the present case, both robberies being street hold-ups in downtown Newark of persons carrying employer's funds to a downtown bank (6a, 71a).

Shortly after the examination of juror Kuhnle on the *voir dire*, another prospective juror, Miss Nora Graf, within the presence and hearing of Kuhnle who had now been accepted and sworn as a juror and who was sitting in the jury box, was challenged by the defense which disclosed that she or a relative had been a victim of a robbery many years before (102a). The record of the *voir dire* examination also shows that five additional talesmen examined after Kuhnle, in his presence and hearing, were asked the armed robbery question (102a, 103a); that the talesman examined immediately after Kuhnle volunteered that his office had recently been burglarized (101a). Without exception each of these prospective jurors who showed any sensitivity on the subject were challenged by the defense (101a to 104a). In addition, juror Kuhnle heard the Judge excuse a prospective juror who had informed the Judge that he carried considerable money in his business for his employer (104a). Notwithstanding all these additional incidents juror Kuhnle throughout preserved his deceptive silence as to his own recent victimization by armed robbers.

While the basic facts of criminal guilt were in effect conceded by the defense at the trial (*State* v. *Grillo*, 11 N. J. 173, 186) the state record shows that virtually every talesman including juror Kuhnle were expressly and meticulously examined by the defense on the *voir dire* as to his fair and impartial ability to afford to one or more of the defendants the benefit of the State's statutory life imprisonment jury recommendation (118a to 120a). The importance of this factor in the case is accented by the circumstances of the extreme youth of all three of the defendants in the state trial, the derivative foundation of the State's murder charge (felony-murder rather than premeditation), the conceded fact that only one (Grillo) of the three defendants fired the weapon, and the uncontradicted defense testimony that the firing was unintentional (*State* v. *Grillo*, 11 N. J. 173, 179).

Kuhnle's fraudulent concealment of his then quite recent experience as a victim of a robbery effectively cut off the defense on the *voir dire* from exploring into a situation which under the facts which have since come to light points to a fraudulent calculation, vindictiveness, partiality and prejudice on Kuhnle's part.

The petitioner's argument we submit is fully answered by Justice WACHENFELD of the New Jersey Supreme Court when, in his dissenting opinion (16 N. J. 103, 116), he stated:

> "* * * One who has been assaulted, threatened with a deadly weapon and robbed is not likely to forget or to forgive nor to treat lightly or even fairly similar conduct in others. This is a normal human reaction following customary behavior, expected and anticipated by the background of experience. . . .
>
> "Counsel were endeavoring to secure jurors who had not been embittered by having been subjected to the same treatment which was the basis of the charge pending against the accused. They made it quite clear they were trying to avoid triers of fact who had suffered [illegible]like factual experience.
>
> "That was the kind of jury the defendants were entitled to but were unsuccessful in obtaining, as evidenced by the disclosures after trial.
>
> "A life should not be taken by legal process unless every reasonable doubt is resolved in favor of the condemned, and unless the best judicial procedure has been 'rigidly and jealously enforced,' *State* v. *Auld*, 2 N. J. 426, 442 (1949), dissenting opinion."

2. Petitioner further contends (Pt. 19-20) that Kuhnle answered truthfully to the following question:

> "Q. You don't know any of the State's officers or personnel? A. No, sir."

Petitioner adopts the view of the majority of the New Jersey Supreme Court, *State* v. *Grillo*, 16 N. J. 103, 115, that "State's officers or personnel" meant State of New Jersey officials or employees and not City of Newark police or County of Essex officials. It is submitted that this summary consideration of the matter is not a fair treatment of the respondent's charge.

The question is whether the words "The State" would likely mean to the juror "the prosecutor" or whether Kuhnle thought the defense lawyer was concerned with officials in Trenton which the State Supreme Court considered the reaction of a reasonable person.

Kuhnle was the first talesman questioned in the afternoon of the first day's proceeding. During the morning's proceedings he heard the Court and counsel refer to the prosecutor as "The State" no less than 41 times. In addition the prosecutor was referred to as "The State" 8 times (including a repeat question) in the questioning of Kuhnle himself. Indeed, the words "The State" and the "prosecution" were used interchangeably in Kuhnle's questioning. For instance, a question was posed to him in terms of the "prosecution" while almost immediately thereafter the Assistant Prosecutor propounded practically the identical question in terms of "The State" (74a).

In view of the obvious concern of the defense for the weeding out of jurors who had anything to do with law enforcement (over 30 talesmen were interrogated on the subject) and in view of the fact that Kuhnle himself was asked if any member of his immediate family were "connected in any way with any law enforcement agency" (108a), we submit that Kuhnle understood the question as it was posed. If he did not understand it he was clearly in duty bound to so indicate.

In any event, the State Supreme Court shrugged off the whole matter by stating, at 16 N. J. 103, 115 (133a):

"Even so, * * * there is no evidence that the subject matter created bias, prejudice, or partial status in the mind of the juror". In other words, the fact that Kuhnle may have known officers or personnel who had a hand in the presentation of the State's case was not prejudicial. Even if this conclusion was correct we say the respondent's main complaint is not that Kuhnle may have known any of these people but that he falsely denied knowing them.

It is submitted that petitioner's contention is without merit and is fully answered by Judge McLaughlin, speaking for the majority, when he stated (Pt. p. 32):

> "* * * On this allegation that court, while it inferred that Kuhnle probably did not understand the query to include employees of the county—like the prosecutor or of the city—like the police, could not close the door to the inclusiveness of the phrase. In its dilemma the whole subject of Kuhnle knowing one or more of the law enforcement people connected with the State's case was eliminated by the comment that assuming such relationship there was no evidence it caused Kuhnle to be prejudiced. With the possibility of this grave condition admitted, the state court may have been content in that decision to forget about it as it had regarding the admitted possibility of bias stemming from the robbery discussed above. However under *Brown* v. *Allen, supra,* we cannot do that for it would be monstrous to pretend that the state has given fair consideration to this part of the prejudice claim and reached a satisfactory conclusion."

3. Petitioner also contends (Pt. p. 16) that Kuhnle's failure to disclose the fact of his armed robbery experience did not disqualify him as a juror "as a matter of law". This contention loses sight of the well settled law that the right to a fair and impartial jury is a part of due process. *Buchalter* v. *New York*, 319 U. S. 427 (1943); *Chambers* v. *Flor-*

ida, 309 U. S. 227, 236-237 (1940); *United States* v. *Wood*, 299 U. S. 123 (1936); *Baker* v. *Hudspeth*, 129 F. 2d 779 (C. C. A. 10, 1942), cert. den. 317 U. S. 681, reh's den. 317 U. S. 711, 318 U. S. 800.

The law is well settled that where evidence that a juror fraudulently concealed a material fact on the *voir dire* is substantiated, it is the duty of the trial judge to discharge the entire jury and the proceedings theretofore held are a nullity so that the defendant may be put to another trial without placing him in double jeopardy. *Hedger* v. *State*, 144 Wis. 279, 128 N. W. 80 (1910); *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902); *State* v. *Bell*, 81 N. C. 591 (1879); *State* v. *Washington*, 89 N. C. 535 (1883).

The cases are legion which hold that a verdict may be challenged where discovery is made that a juror concealed a disqualification or incompetency which was not known beforehand.

The principle just stated is peculiarly apposite where the later-discovered ground of disqualification is bias and prejudice. *Remmer* v. *United States*, 350 U. S. 377 (1956); *Wright* v. *Bernstein*, 23 N. J. 284 (1957).

The effect of a juror's fraudulently obtaining his position on the jury has been characterized by this Court in language suggesting that outright nullity of the entire proceeding results therefrom. *Clark* v. *United States*, 289 U. S. 1, 11 (1933).

As was remarked by Mr. Justice FIELD in a case where the Court voided a penitentiary sentence as wholly beyond the jurisdiction of the sentencing judge to impose, "The laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized." *Re Bonner*, 151 U. S. 242, 259 (1894).

No more than a judge's should a juror's finger weigh unlawfully upon any man or point him, unlawfully, even to a doom which were otherwise lawful.

In a death case, that effort is but reasonable which is utmost, to ensure that the law shall afford to the defendant its even-handed benefits as it poises over him its even-handed penalty.

The petitioner's contention as to Kuhnle's impartiality, we submit, is based on speculation. Judge McLaughlin, speaking for the majority, properly set forth the principle which must govern a criminal case when he said (Pt. p. 35):

> "* * * The assurance of an impartial tribunal is too vital to be subjected to speculation concerning the quantum of prejudice flowing from this grossly disqualified juror."

CONCLUSION

The case was correctly decided below. The petition for writ of certiorari does not present any question meriting further review by this Court.

We, therefore, respectfully submit that it should be denied.

Respectfully submitted,

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